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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 97

SAMUEL J. KATZBERG, LOUIS HAIG AND JACOB F. SCHMITT, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 5–6) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 3, 1941 (R. 6). A motion for leave to file an amended petition was denied on April 12, 1941 (R. 7). The petition for a writ of certiorari was filed May 21, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752, 28 U. S. C., Supp. V, § 288.

QUESTION PRESENTED

Whether, after a claim for reward has been rejected by the Commissioner of Internal Revenue, an informer may recover in the Court of Claims the value of services rendered pursuant to Internal Revenue Circular No. 99, 5th Revision.

STATUTES INVOLVED

Revised Statutes, Section 3463, and Internal Revenue Circular No. 99, 5th Revision, are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

On October 28, 1940, petitioners sued in the Court of Claims to recover from the United States 10% of the amount recovered by the United States for violation of the Internal Revenue laws by reason of information which petitioners allegedly furnished to the United States. A demurrer to the petition was sustained (R. 6). The facts, as alleged in the petition, are as follows:

The United States offered a reward for information leading to the detection and punishment of persons violating the Internal Revenue laws, the amount of the reward to be such as the Commissioner of Internal Revenue "may deem suitable" (R. 1).[1] Thereafter, on November 27, 1934,

[1] Section 3463 of the Revised Statutes, 26 U. S. C. § 3792, authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to pay such sums, "not exceeding in the aggregate the sum appropriated there-

petitioners gave original information to a customs officer at the Port of New York and to the Secretary of the Treasury, of certain frauds committed upon the customs revenue by the named importers (R. 2). At the request of the petitioners and in the due course of his procedure in such cases, a customs officer notified the Internal Revenue office of the perpetrated frauds, with the view of having possible frauds upon the Internal Revenue laws investigated (R. 2). In January 1935, petitioners orally and in writing advised customs officers and the Intelligence Bureau of the Collector of Internal Revenue, at the County of New York, that the importers had not only been guilty of customs frauds but had also violated the Internal Revenue laws (R. 3). The information furnished to the customs officers led to the recovery by the United States of unlawfully withheld customs duties, and an award was allowed and paid petitioners by the Secretary of the

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for, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws * * *." Pursuant to this statute, the Commissioner, with the approval of the Secretary, issued Internal Revenue Circular 99, 5th Revision, in which he offered "for information given by persons other than officers of internal revenue * * * that shall lead to the detection and punishment of persons guilty of violating the internal revenue laws * * * such reward as the Commissioner of Internal Revenue may deem suitable, but in no case exceeding 10 percent of the net amount of fines, penalties, forfeitures, and taxes, which by reason of said information shall be recovered * * *."

Treasury pursuant to Section 619 of the Tariff Act of 1930 (R. 3). The information also led to the detection and punishment of the importers for violation of the Internal Revenue laws, and to the recovery of fines, penalties, forfeitures, and taxes in the sum of $50,000 accepted in compromise by the Commissioner of Internal Revenue. Petitioners filed claim for a reward with the Commissioner of Internal Revenue (R. 3) which the Commissioner rejected (R. 4). This rejection is alleged to have been arbitrary and capricious (R. 4).

In sustaining the demurrer, the court below followed its prior decision in *Gordon* v. *United States,* Court of Claims, No. 45170, decided February 3, 1941, and held that the promise to pay such amount as the Commissioner might honestly deem "suitable" was too indefinite to be enforceable and that a promise to pay the reasonable value of the services rendered could not be implied (R. 6).

ARGUMENT

1. The decision of the court below is clearly correct. The offer set forth in Internal Revenue Circular No. 99, 5th Revision, was to pay "such reward as the Commissioner of Internal Revenue may deem suitable." The Commissioner having rejected the petitioners' claim, no recovery may be had on the express promise. Cf. *Butler* v. *Winona Mill Co.*, 28 Minn. 205. The offer, it

is true, implied a promise in fact that the Commissioner would make an honest determination. But no recovery may be had for the breach thereof, even assuming that the Commissioner's rejection of the claim was arbitrary and capricious, since, as the court below observed (R. 6), "no definite or ascertainable sum was offered" and the courts have "no way of knowing" what sum the Commissioner would have deemed suitable if he had exercised his honest discretion. Cf. *Von Reitzenstein* v. *Tomlinson,* 249 N. Y. 60; *Roberts* v. *Smith,* 4 H. & N. 315; Williston, Contracts (Rev. ed. 1936) § 43 *et seq.*[2]

Nor may recovery be had for the "reasonable value" of the services rendered. The express offer to pay such amount as the Commissioner deemed "suitable" negatived any promise implied in fact to pay a "reasonable" amount. *Butler* v. *Winona Mill Co., supra; Tennant* v. *Fawcett,* 94 Tex. 111, reversing 55 S. W. 611 (Tex. Civ. App.) cited by petitioners; *Roberts* v. *Smith, supra; Vlachos* v. *United States,* 90 C. Cls. 165, 172.

[2] Nominal damages may be recovered, of course, for breach of a valid contract to make an honest determination, but petitioners make no contention that the court below erred in failing to hold that petitioners stated a cause of action for nominal damages. Moreover, the allegation that the Commissioner acted "arbitrarily" and "capriciously" (R. 4) in rejecting petitioner's claim is a legal conclusion, not admitted by the demurrer (cf. *Silberschein* v. *United States,* 266 U. S. 221, 225), and, as may be inferred from other allegations of the petition (R. 3), there were reasonable grounds upon which the Commissioner may have acted.

And while such a promise may be implied in law in an action between private parties (*Kearns* v. *Andree,* 107 Conn. 181), it is well settled that the "Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law." *Merritt* v. *United States,* 267 U. S. 338, 341; *United States* v. *Minnesota Mutual Inv. Co.,* 271 U. S. 212, 217.[3] In *Winton* v. *Amos,* 255 U. S. 373, cited by petitioners, a special act of Congress expressly authorized the Court of Claims to hear, consider, and adjudicate the claims of plaintiffs against the Choctaw Indians for services rendered and "to render judgment thereon on the principle of quantum merit in amounts equitably and justly due." The other cases cited by petitioners as authority for recovery upon a quantum meruit (Pet. 14) are likewise not in point. In none of them did the express promise negative a promise implied in fact to pay "reasonable" compensation, and none of the actions were instituted under the Tucker Act.

The decision below may be supported on another equally conclusive ground. The statute

[3] Accord: *Alabama* v. *United States,* 282 U. S. 502; *Merritt* v. *United States,* 267 U. S. 338; *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592; *Tempel* v. *United States,* 248 U. S. 121; see *United States* v. *Algoma Lumber Co.,* 305 U. S. 415, 418–419.

(Revised Statutes, Sec. 3463) pursuant to which the Internal Revenue Circular was issued expressly requires the approval of the Secretary of the Treasury as a condition of any payment, a requirement which has always been considered to apply to the payment of each specific award even though the general offer in the Circular has received the Secretary's approval. 15 Op. Atty. Gen. 133 (1876). It is not alleged that the Secretary has approved the payment of any sum to petitioners. In these circumstances no payment is authorized and no recovery may be allowed. *United States* v. *Crosthwaite,* 168 U. S. 375; *Vlachos* v. *United States,* 90 C. Cls. 165.

2. No question of importance is involved. Although Circular No. 99 in substantially its present form has been in effect for at least sixty-five years and numerous claims for rewards thereunder have been rejected (See, e. g., Annual Report of the Commissioner of Internal Revenue, 1940, p. 49), the contention that recovery could be had under the Tucker Act after a rejection by the Commissioner was apparently first advanced in the *Gordon* case, decided February 3, 1941. So far as we are aware, the question is not involved in any other case now pending.

CONCLUSION

The decision of the court below is correct. There is no conflict and no question of importance is

involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1941.